

**United States Department of Labor  
Employees' Compensation Appeals Board**

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**J.M., Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
Monroeville, PA, Employer**

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**Docket No. 15-1586  
Issued: March 23, 2016**

*Appearances:*

*Douglas Sughrue, Esq., for the appellant*

*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

CHRISTOPHER J. GODFREY, Chief Judge  
PATRICIA H. FITZGERALD, Deputy Chief Judge  
COLLEEN DUFFY KIKO, Judge

**JURISDICTION**

On July 17, 2015 appellant, through counsel, filed a timely appeal of a January 23, 2015 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days elapsed from the last merit decision, dated October 23, 2013, to the filing of this appeal, pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3 the Board lacks jurisdiction to review the merits of the claim.

**ISSUE**

The issue is whether OWCP properly denied appellant's request for reconsideration as it was untimely filed and failed to establish clear evidence of error.

On appeal counsel argues that appellant had filed a timely request for reconsideration postmarked October 22, 2014 and the claim should therefore be provided a merit review. In support of this argument, he asserts that the request form was sent by priority express, two-day shipping through the U.S. Postal Service and was available for pick up at OWCP's mail processing center on October 23, 2014, which establishes receipt within one year of the

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

October 23, 2013 merit decision. Counsel further asserts that because the request for reconsideration was available for OWCP to scan into appellant's file on Thursday, October 23, 2014 and because appellant cannot be responsible for how quickly or slowly OWCP picked up mail from the appropriate mailbox or concluded its scanning of a document into a file, the request should be considered timely. He concludes that merely because the request form was not scanned into OWCP system until October 27, 2014 does not establish that the request was untimely filed. In support of his arguments, counsel submitted a product and tracking information receipt from the U.S. Postal Service.

### **FACTUAL HISTORY**

On December 5, 2011 appellant, then a 48-year-old letter carrier, filed an occupational disease claim (Form CA-2) alleging that he developed stress on the job. In a letter dated January 13, 2012, OWCP requested additional factual and medical evidence in support of his claim.

Appellant alleged that on October 24, 2011 he had requested sick leave to attend a doctor's appointment on October 26, 2011 and he placed the request on the desk of his supervisor, S.T. He did not receive a response to his request on October 24, 2011 and was not scheduled to work on October 25, 2011. Appellant attended his scheduled medical appointment on October 26, 2011 and then reported to work. Upon his return to the workplace, S.T., questioned the validity of his appointment, allegedly with a demeaning and disrespectful tone. Appellant believed that S.T., intended to elevate the conversation into something physical and that appellant felt that his personal space was being violated. He developed rapid heartbeat and shallow breathing.

Dr. Richard K. Gongloff, a Board-certified internist, examined appellant on October 31, 2011 due to chest pain. He did not find that appellant had an acute coronary syndrome. Dr. Gongloff reported that appellant claimed to have been at a union meeting and developed an abnormal sensation in his chest, dizziness, and light-headedness. Appellant indicated that he had been anxious about going back to work, that he was a union steward, that he had daily confrontations with management, and that he was fearful that he would require further hospitalization. Dr. Gongloff diagnosed atypical chest pain and anxiety state. He found that appellant was totally disabled for three weeks. Appellant claimed that, on October 27, 2011 due to staffing shortages, he was being forced to violate his work restriction of no overtime. That evening he had dinner with a friend and recently retired coworker, Rick Lutz, and at dinner became light headed, nauseated, and felt pressure in his chest. Appellant stated that he was anxious, confused, and disoriented. Mr. Lutz drove appellant to the hospital.

On October 28, 2011 appellant received a suspension for 14 days no time-off due to failure to follow instructions regarding his October 24, 2011 leave request. The employing establishment noted that he had also previously been issued a seven-day no time off suspension on October 4, 2011 for improper conduct and failure to follow instructions, but appellant had been unaware of the earlier suspension.

Appellant stated that the employing establishment had experienced a reduction in staff causing additional work hours and workload contributing to his stress. He noted that the Plum office was recently consolidated with the Monroeville office which resulted in additional work

hours and workload. Appellant reported additional travel to and from work, route adjustments, and an additional workload. He alleged that the added workload resulted in the majority of the routes working well over a normal eight-hour day. Appellant stated, "This has caused me additional stress because of the ongoing disagreements with management regarding whether or not the routes are properly evaluated at eight hours."

Appellant suffered an anxiety attack after hearing that, another of his supervisors, A.H., had died on November 9, 2011 due to a heart attack. He believed that he would be next to die. On November 15, 2011 a coworker, M.G., informed appellant of her anxiety due to work issues and was also transported by ambulance to a medical facility. This incident increase also attributed to his anxiety.

On November 21, 2011 appellant notified his manager, R.S., of his additional period of disability and provided medical documentation from Dr. Gongloff. The manager indicated that the medical information provided was insufficient. Appellant discussed with R.S., the October 4, 2011 7-day suspension, which had been mentioned in the later October 28, 2011 14-day suspension. In that discussion, he learned that A.H. had issued the seven-day suspension for appellant just prior to his death. Appellant stated that he believed that the employing establishment had killed A.H.

Appellant claimed that, after making that statement, his manager, R.S., walked toward him, invading his personal space, and in an elevated voice informed appellant that he would write and sign a resignation letter for him so that he would not have to return to the employing establishment. He informed R.S. that he felt threatened and asked him not to use that tone to address him. Appellant alleged that R.S. then began waving his arms and displaying uncontrolled anger. R.S. asked appellant if he believed that he was being threatened. Appellant left and experienced a panic attack.

Appellant generally alleged that the employing establishment had not timely processed his occupational disease claim (Form CA-2). He further alleged that R.S. was irritable, sarcastic, and hostile when discussing his claim *via* telephone on December 15, 2011. Appellant again experienced an anxiety attack while at a party discussing working conditions on December 17, 2011. He reported to work on January 19, 2012 and alleged that he had another confrontation with R.S. regarding a notebook and regarding his request for assistance to complete his route in eight hours. R.S. denied the assistance and claimed that he would discipline appellant for failing to complete the route. Appellant responded that he needed medical attention and R.S. threatened him with additional discipline if he abandoned his route.

On January 23, 2012 appellant was seen by Dr. Gongloff who found that appellant was able to work a maximum of eight hours per shift to minimize his work-related stress from January 20 through 31, 2012. In a February 6, 2012 note, Dr. Gongloff diagnosed anxiety with panic attacks and high blood pressure. He attributed appellant's anxiety to adverse working conditions and interactions with management. On March 26 and April 16, 2012 Dr. Gongloff again restricted appellant to working no more than eight hours a shift due to his diagnosed anxiety and panic disorder which were exacerbated by work-related stress.

Appellant worked on January 24, 2012 and alleged that he was denied union time to process grievances. He began his route, reported to D.M., a supervisor, that he would not be able

to complete it within his eight-hour work restrictions, and returned with mail after eight hours. D.M. disputed the allegation and claimed that appellant only had six hours of mail to deliver and there was no basis for failure to make the deliveries.

The employing establishment proposed to terminate appellant on February 9, 2012 due to his failure to follow instructions and not completing his assigned tasks within eight hours on January 24, 2012.

By decision dated August 6, 2012, OWCP accepted as factual that appellant was required to exceed his eight-hour a day work restriction, but that the medical evidence was insufficient to establish that the employment factor of exceeding work restrictions caused or contributed to his diagnosed conditions.

Appellant timely requested reconsideration on July 19, 2013. Counsel argued that he was providing new medical evidence requiring review of the merits. He further alleged that appellant had substantiated additional compensable factors of employment, including verbal altercations and a tense relationship with his supervisor, harassment, and an additional verbal abuse episode on May 2, 2012 supported by witness statements.

In a report dated December 18, 2012, Dr. Louis K. Hauber, a Board-certified psychiatrist, diagnosed major depression and panic disorder. He opined that appellant's current work environment was aggravating his underlying psychiatric disorder.

Dr. Joel I. Last, a Board-certified psychiatrist, completed a report on February 5, 2013 and attributed appellant's anxiety to an overburdened route, forced mandatory overtime, understaffing, and abusive management. He opined that appellant could not work more than eight hours a day due to his diagnoses of anxiety and depression which are "a direct result of the stress [appellant] is experiencing in his work environment." Dr. Marnin E. Fischbach, a psychiatrist, submitted a report dated May 20, 2013 noting that he had examined appellant on December 31, 2012. He described appellant's increased work hours due to the closure of the Plum, PA employing establishment, which included working more than 10 hours a day. Dr. Fischbach noted that the extra hours were a major stressor for appellant. He noted that appellant alleged that he continued to be harassed by his supervisor about his eight-hour a day work restriction and that his supervisor threatened him in May 2012 due to his poor work performance. Dr. Fischbach diagnosed panic disorder without agoraphobia and opined that this condition was precipitated by intensely stressful events.

Dr. Gongloff completed a report on May 28, 2013 and again diagnosed anxiety with panic attacks in addition to high blood pressure. A coworker, T.R., submitted a witness statement alleging on October 26, 2011 S.T. asked appellant, in an elevated hostile tone, why he attended a doctor's appointment. T.R. asserted that S.T.'s actions were belligerent, unprofessional, disrespectful, and hostile. He stated that S.T. interrupted appellant when he tried to offer explanations.

Appellant submitted two letters from postal customers who wrote of their observations of a man in a red vehicle following and verbally confronting their mail carrier, appellant, while he was on his route.

By decision dated October 23, 2013, OWCP denied modification of its prior decision dated August 6, 2012 and noted on May 6, 2013 that appellant had filed a separate traumatic injury claim (Form CA-1) alleging that he experienced chest pains on May 4, 2012 as a result of harassment by his supervisor. This traumatic injury claim was accepted for aggravation of panic disorder. However, OWCP found that the medical evidence was insufficient to establish that appellant's panic disorder was caused or contributed to by his accepted employment factor of work outside his eight-hour restriction. It determined that there was no rationalized medical opinion evidence supporting a causal relationship between his diagnosed conditions and his accepted employment factor.

Appellant requested reconsideration through an undated letter postmarked October 22, 2014 and received by OWCP on October 27, 2014. He alleged that his stress began in the spring of 2011 with the consolidation of the Plum and Monroeville offices. Appellant repeated his allegations that he was forced to work overtime, and that the employing establishment had not properly staffed the office or maintained the length of the routes in proper adjustment. He alleged that his anxiety and panic attacks were caused by mandatory overtime as well as the abusive acts of his supervisors. Appellant submitted five statements from coworkers alleging that when the Plum station was moved to Monroeville, this added additional travel time of 30 minutes for all the routes, that routes were over eight hours, and that carriers were forced to work overtime resulting in stressful working conditions.

By decision dated January 23, 2015, OWCP declined to reopen appellant's claim for consideration of the merits as his request for reconsideration was untimely filed and did not establish clear evidence of error.

### **LEGAL PRECEDENT**

Section 8128(a) of FECA<sup>2</sup> does not entitle a claimant to a review of an OWCP decision as a matter of right.<sup>3</sup> This section vests OWCP with discretionary authority to determine whether it will review an award for or against compensation.<sup>4</sup> OWCP, through regulations has imposed limitations on the exercise of its discretionary authority. One such limitation is that OWCP will not review a decision denying or terminating a benefit unless the application for review is timely. In order to be timely, a request for reconsideration must be received by OWCP within one year of the date of OWCP's merit decision for which review is sought. Timeliness is determined by the document receipt date of the reconsideration request (the "received date") in the Integrated Federal Employee's Compensation System (iFECS).<sup>5</sup> The Board has found that the imposition of this one-year time limitation does not constitute an abuse of the discretionary authority granted OWCP under 5 U.S.C. § 8128(a).<sup>6</sup>

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<sup>2</sup> *Id.* at § 8128(a).

<sup>3</sup> *Thankamma Mathews*, 44 ECAB 765, 768 (1993).

<sup>4</sup> *Id.* at 768; *see also Jesus D. Sanchez*, 41 ECAB 964, 966 (1990).

<sup>5</sup> 20 C.F.R. § 10.607; Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4(b) (October 2011). *G.F.*, Docket No. 15-1053 (issued September 11, 2015).

<sup>6</sup> *Supra* note 3 at 769; *Jesus D. Sanchez*, *supra* note 4 at 967.

In those cases where requests for reconsideration are untimely filed, the Board has held that OWCP must nevertheless undertake a limited review of the case to determine whether there is clear evidence of error pursuant to the untimely request.<sup>7</sup> OWCP procedures state that OWCP will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in OWCP regulations, if the claimant's request for reconsideration shows "clear evidence of error" on the part of OWCP.<sup>8</sup>

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by OWCP.<sup>9</sup> The evidence must be positive, precise, and explicit and must be manifest on its face that OWCP committed an error.<sup>10</sup> Evidence which does not raise a substantial question concerning the correctness of OWCP's decision is insufficient to establish clear evidence of error.<sup>11</sup> It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.<sup>12</sup> This entails a limited review by OWCP of how the evidence submitted with the reconsideration request bears on the evidence previously of record and whether the new evidence establishes clear error on the part of OWCP.<sup>13</sup> To establish clear evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflict in medical opinion or establish a clear procedural error, but must be of sufficient probative value to shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of OWCP's decision.<sup>14</sup> The Board must make an independent determination of whether a claimant has submitted clear evidence of error on the part of OWCP such that OWCP abused its discretion in denying merit review in the face of such evidence.<sup>15</sup>

### ANALYSIS

The Board finds that appellant's October 2014 request for reconsideration was untimely filed as it was not received into iFECS by OWCP within one year of the most recent merit decision dated October 23, 2013 as required. OWCP procedures provide that the one-year time limitation period for requesting reconsideration begins on the date of the original OWCP decision.<sup>16</sup> A right to reconsideration within one year also accompanies any subsequent merit

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<sup>7</sup> *Supra* note 3 at 770.

<sup>8</sup> *See supra* note 5 at Chapter 2.1602.5 (October 2011).

<sup>9</sup> *Supra* note 3.

<sup>10</sup> *Leona N. Travis*, 43 ECAB 227, 241 (1991).

<sup>11</sup> *Jesus D. Sanchez*, *supra* note 4 at 968.

<sup>12</sup> *Supra* note 10.

<sup>13</sup> *Nelson T. Thompson*, 43 ECAB 919, 922 (1992).

<sup>14</sup> *Leon D. Faidley, Jr.*, 41 ECAB 104, 114 (1989).

<sup>15</sup> *Nancy Marciano*, 50 ECAB 110 (1998).

<sup>16</sup> 20 C.F.R. § 10.607(a). The one-year period begins on the date of the original decision, and an application for reconsideration must be received by OWCP within one year of OWCP's decision for which review is sought for merit decisions issued on or after August 29, 2011. *Supra* note 5 at Chapter 2.1602.4 (October 2011).

decision on the issues.<sup>17</sup> As OWCP received appellant's October 2014 request for reconsideration into its iFECS system on October 27, 2014, more than one year after the last merit decision of record dated October 23, 2013, it was untimely. Consequently, appellant must establish clear evidence of error by OWCP in denying his claim for compensation.<sup>18</sup>

On appeal counsel argues that OWCP timely received his request for reconsideration on October 23, 2014 as evidenced by the tracking receipt he submitted, on appeal, in support of this contention. The Board, however, cannot review this evidence for the first time on appeal.<sup>19</sup> Furthermore, according to OWCP procedures, the received date is determined solely by the document received date in iFECS, October 27, 2014.<sup>20</sup> This date of receipt makes the reconsideration request untimely.<sup>21</sup>

The Board further finds that appellant's untimely request for reconsideration did not establish clear evidence of error on the part of OWCP.

OWCP denied appellant's emotional condition claim finding that he had not submitted the necessary medical opinion evidenced to establish that his anxiety and depression were causally related to the requirement that he work more than eight hours per day, an accepted factor of employment. In support of his request for reconsideration, appellant submitted no additional medical evidence relating to the accepted employment factor. Instead, he repeated his allegations that he was forced to work overtime and that the employing establishment did not properly staff the office or maintain the routes in proper adjustment. Appellant alleged that his anxiety and panic attacks were caused by mandatory overtime as well as the abusive acts of his supervisors. He submitted additional witness statements that employees were required to work more than eight hours to complete their assigned routes and that this was stressful. The additional witness statements, however, do not raise a substantial question as to the correctness of OWCP's decision. While appellant's coworkers generally spoke to the change in work hours and increased stress, these statements do not establish error in OWCP's decision.<sup>22</sup> In order to establish clear evidence of error, the evidence must be of sufficient probative value to shift the weight of evidence in favor of the claimant and raise a substantial question as to the correctness of the merits of OWCP's decision. The Board finds that the evidence submitted on reconsideration failed to meet this standard and, thus, OWCP properly denied merit review.<sup>23</sup>

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<sup>17</sup> *Robert F. Stone*, 57 ECAB 292 (2005).

<sup>18</sup> 20 C.F.R. § 10.607(b); *G.F.*, Docket No. 15-1052 (issued September 11, 2015).

<sup>19</sup> *Id.* at § 501.2(c).

<sup>20</sup> Federal (FECA) Procedure Manual, *supra* note 5 at Chapter 2.1602.4(b) (October 2011).

<sup>21</sup> *G.F.*, Docket No. 15-1052 (issued September 11, 2015) (finding that the timeliness of a request for reconsideration is not determined by a tracking receipt, but by the date the reconsideration request is entered into iFECS).

<sup>22</sup> *Robert G. Burns*, 57 ECAB 657 (2006).

<sup>23</sup> *Id.*

Appellant also submitted a copy of the obituary of A.H. and resubmitted his October 2011 14-day suspension. He did not explain how these documents, on their face, could establish clear evidence of error on the part of OWCP.<sup>24</sup> The Board finds that this additional factual evidence does not establish clear error on the part of OWCP and is therefore insufficient to require OWCP to reopen appellant's claim for consideration of the merits.

### **CONCLUSION**

The Board finds that appellant's request for reconsideration was untimely and did not establish clear evidence of error.

### **ORDER**

**IT IS HEREBY ORDERED THAT** January 23, 2015 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 23, 2016  
Washington, DC

Christopher J. Godfrey, Chief Judge  
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Deputy Chief Judge  
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

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<sup>24</sup> Z.T., Docket No. 15-0250 (issued July 16, 2015) (finding it is necessary to submit an explanation of how the evidence creates clear evidence of error on its face).